Matson Terminals, Inc. *and* Marine Clerks Association, International Longshoremen's and Warehousemen's Union, Local 63. Case 21–CA–30562

July 31, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND FOX

On February 23, 1996, Administrative Law Judge Frederick C. Herzog issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, the Charging Party filed its brief to the judge as an answering brief, and the Respondent filed a reply brief to the General Counsel's answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings[1] as explained below, and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

1. The judge found that the Respondent violated Section 8(a)(3) on February 11, 1995, by assigning supervisory duties to vessel planners to discourage them from supporting the Union.[3] The Respondent's exceptions argue that the judge's conclusion is inconsistent with his finding that the Respondent demonstrated it would have implemented its plan eventually even in the absence of the Union's organizing activity. In support of its exceptions, the Respondent emphasizes testimony that it would have implemented the plan no later than March 13, 1995.

The Respondent misapprehends the basis for the finding of the violation. The judge found an unfair labor practice because of the timing of the Respondent's conversion of vessel planners to supervisors. The reason for the timing of the Respondent's action, according to the judge, was to discourage support for the Union. We agree with the judge. Given the facts of this case, we also believe it is implicit in the judge's finding of discriminatory conduct that the Respondent acted when it did[4] in order to avoid the possibility of a representation election and the possibility of having to bargain with the Union about converting vessel planners into supervisors.[5]

We do not agree with the Respondent that testimony that the Respondent would have implemented the plan no later than March 13, 1995, when a new operations manager was to begin work at the terminal, rebuts the General Counsel's prima facie case. As stated above, the violation was the acceleration of the implementation of the plan to avoid any bargaining obligation. In other words, absent the timing of the implementation of the plan, *the Respondent might have incurred a bargaining obligation that could have prevented the Respondent from acting in March 1995*.

Under the circumstances—i.e., where the Respondent might have incurred a bargaining obligation but for its unfair labor practice—the testimony on which the Respondent relies shows only that the Respondent would have acted in March 1995 if it had no bargaining obligation. We believe that to find no violation because the Respondent would have acted 2 months later absent a bargaining obligation would be to reward the Respondent for violating the Act.

2. The Respondent also excepts to the portion of the judge's recommended Order requiring that reinstatement of the vessel planners continue ''until such time as an election is held and the results are certified.'' We agree with the judge's recommended Order.

It is firmly established that remedial matters are traditionally within the Board's province and that we have broad authority under Section 10(c) to ensure that unfair labor practices are remedied. E.g., *Schnadig Corp.*, 265 NLRB 147 (1982). Thus, the Board may impose a remedy not requested by the General Counsel.[6]

[1] The record shows the Respondent hired 9, rather than 12, employees between June 1994 and January 1995. We correct this error, and we note that this does not affect our decision.

[2] We shall modify the judge's recommended Order and notice in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996). We shall also modify the recommended Order and notice to provide the standard ''in any like or related'' cease-and-desist language.

[3] Our finding that converting vessel planners into supervisors violated the Act because of the Respondent's unlawful motive for doing so is not in conflict with our cases holding that employers may promote bargaining unit members to supervisory positions for legitimate reasons.

[4] There appears to be no dispute that the Respondent accelerated the implementation of the plan. The Respondent's attorney and witnesses stated, variously, that the recognition request ''focused the company's attention,'' ''made us get off the dime, if you will, and move,'' meant that ''it was very much necessary to move forward,'' and ''galvanized our position in the need to move forward with our plan.''

[5] In general, an employer ''does not have a statutory duty to bargain with a union concerning his nondiscriminatory choice of supervisory personnel.'' *Kendall College*, 228 NLRB 1083, 1088 (1977). However, ''where an employer promotes bargaining unit employees to supervisory positions, with a consequent abolition of bargaining unit jobs, the duty to bargain arises.'' Id. In this case, the judge found, and we agree, that the Respondent's actions ''eradicated the unit.'' Thus, if the Union had been the vessel planners' bargaining representative, the Respondent's plan would have been a mandatory subject of bargaining and could not have been implemented unilaterally.

[6] We note that the Charging Party did request as a remedy the Order the judge recommended. Moreover, the General Counsel, in his answering brief, supports the judge's remedy.

As found above, we believe that the Respondent committed the unfair labor practice in this case in order to avoid the possibility of a representation election and the possibility of having to bargain with the Union about converting vessel planners into supervisors. The judge's recommended Order is specifically crafted to the facts of this case. It provides that the Respondent may not unilaterally proceed with its plan, which it utilized to avoid a representation election, until it is clear that it has no bargaining obligation. We believe that, given the facts of this case, the recommended Order is appropriate and designed to ensure the effectuation of the policies of the Act.[7]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Matson Terminals, Inc., Terminal Island, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Assigning supervisory duties to statutory employees to discourage them from supporting Marine Clerks Association, International Longshoremen's and Warehousemen's Union, Local 63 or engaging in concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Eliminate the position of superintendent, terminal operations and restore the positions of senior supervisor, vessel planning; yard superintendent; and vessel superintendent as they existed prior to February 11, 1995.

(b) Within 14 days from the date of this Order, offer full reinstatement to positions, without prejudice to the employees' seniority or any other rights or privileges previously enjoyed, until such time as an election is held and the results are certified.

(c) Make employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Terminal Island, California facility copies of the attached notice marked ''Appendix.''[8] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 2, 1995.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to what steps the Respondent has taken to comply.

[7] The General Counsel has administratively advised the Board that a petition filed by the Union seeking to represent the Respondent's vessel planners is being held in abeyance by Region 21 pending the outcome of this unfair labor practice proceeding. After the Respondent has taken all action required by our remedial Order, there would appear to be no bar to resuming the processing of the representation proceeding. See generally NLRB Casehandling Manual (Part One) Unfair Labor Practice Proceedings, Sec. 11730.8, *Resumption of Processing of R Case on Disposition of ULP Charge*. Of course, except in unusual circumstances, it is Board policy not to hold an election until the posting period has expired, because the 60-day posting period ''is necessary as a means of dispelling and dissipating the unwholesome effects of a respondent's unfair labor practices.'' *Chet Monez Ford*, 241 NLRB 349, 351 (1979).

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT assign supervisory duties to statutory employees to discourage them from supporting Marine Clerks Association, International Longshoremen's and Warehousemen's Union, Local 63 or engaging in concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL eliminate the position of superintendent, terminal operations and restore the positions of senior supervisor, vessel planning; yard superintendent; and vessel superintendent as they existed prior to February 11, 1995.

WE WILL, within 14 days from the date of the Board's Order, offer full reinstatement to the positions, without prejudice to the employees' seniority or any other rights or privileges previously enjoyed, until such time as an election is held and the results are certified.

WE WILL make employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

MATSON TERMINALS, INC.

Jean Libby, Esq., for the General Counsel.
Kenneth W. Anderson, Esq. (Gibson, Dunn & Crutcher), of Los Angeles, California, and *Bal Dreyfus* of Terminal Island, California, for the Respondent.
Robert Remar, Esq. (Leonard, Nathan, Zuckerman, Ross, Chin & Remar), of San Francisco, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

FREDERICK C. HERZOG, Administrative Law Judge. This case was heard by me in Los Angeles, California, on September 14, 15, and 29. It is based on a charge filed by the Marine Clerks Association, International Longshoremen's and Warehousemen's Union, Local 63 (the Union) on March 2, 1995,[1] alleging generally that Matson Terminals, Inc. (Respondent or Matson) committed certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). On June 16, the Regional Director for Region 21 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing alleging that Respondent committed certain violations of Section 8(a)(1) and (3) of the Act. The complaint alleges that on or about February 6, the Union requested that Respondent recognize the Union as the representative of Respondent's vessel planners. It is further alleged that in response to the request for recognition, on or about February 11, Respondent assigned supervisory duties to its vessel planners with the intent of classifying these employees as supervisors so they could be excluded from the requested bargaining unit. Respondent thereafter filed a timely answer to the allegations contained within the complaint, denying all wrongdoing.

All parties appeared at the hearing and were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Based on the record, my consideration of the briefs filed by counsel for the General Counsel, counsel for the Union, and counsel for Respondent, and my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, the answer admits, and I find that, at all times material, Respondent is now, and has been, a Hawaiian corporation, with offices and a principal place of business in Terminal Island, California, where it provides stevedoring and terminal operations services in southern California.[2] During the 12-month period preceding the issuance of the complaint, Respondent, in conducting its operations described above, derived gross revenues in excess of $50,000 for the transportation and handling of goods which originated outside the State of California. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that, at all times material, the Union is, and has been, a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. *General Background*

Respondent provides stevedoring and terminal operations at its Terminal Island facility in southern California. Terminal Island, an 86-acre yard where containers are parked and several buildings are situated, is the busiest of Respondent's three west coast terminals. It provides transportation services to and from Hawaii and the Marshall Islands.

The employees who plan the loading and unloading of cargo from the ships are known as ''vessel planners.'' Vessel planners work on the top floor of the ''Land Tower,'' which is approximately a quarter mile from the dock where the ships are berthed for loading and unloading.

Other employees who work on the loading and unloading of containers include crane operators, longshoremen and marine clerks. Crane operators, longshoremen, and marine clerks are all represented by locals of the Union. Longshoremen work on the dock by the ship and directly on the ship. Marine clerks work all over the yard recording information from containers and instructing the longshoremen regarding the movement of the containers.

B. *The Vessel Planners' Duties and Responsibilities*

Until February 11, the work of planning the loading and unloading of ships was performed exclusively by a certain group of employees. They worked both day and night shifts

[1] Unless otherwise indicated, all dates are in 1995.

[2] Stevedoring is the actual loading and unloading of containers on the ship.

and rarely, if ever, strayed from the Land Tower. The planners who worked the day shift were under the direct supervision of the planning supervisor. Although the night shift planners received instructions from the planning supervisor via E-mail and orally at the end of a shift, they reported directly to their senior and general superintendents. The planners' basic duty was to prepare the stowage plan for cargo on outbound ships, including the required documentation for ships regarding hazardous and refrigerated cargo. The planners generated stowage plans and other required documentation on computers.

Because the planning involved in loading the ship began before the ship would arrive, the planners would prepare stability projections of the estimated load for the ship based on cargo figures provided by the booking department. When those figures were entered on a computer, the computer generated stability figures for the load. The planners give the stability figures to the ship's captain who then generates a ''Cargo Weight Summary'' to determine whether the load will be safe. Once the captain certifies the load as safe, the preparation of the stowage plan begins.

The loading process usually takes approximately 3 days for each ship. Planners first receive a crane line-up from the senior superintendent that specifies the rows on the ship that the cranes will load the containers during that shift. It was the planners' job to decide where and how the hundreds of containers in the yard should be loaded. Once the planner ascertained the row on the ship to be first loaded, the planner would look at a side view of that particular row on the computer, which specified the size of the containers that fit into each spot on the row and the location of the outlets for the refrigerated containers. Once the size and number of the refrigerated containers were identified, the planner obtained a list from the computer of all the containers of the requisite size and began assigning the containers' locations on the row. Planners generally stowed containers based on their weight with the heaviest containers assigned locations at the bottom of the ship and the lightest containers on the top. Deviations from the norm were themselves routine, however. For example, because only certain rows contain outlets for refrigerated containers, the planners placed them where the outlets were located. Many of the containers contained hazardous cargo that had to be segregated according to guidelines published by the Coast Guard in the Code of Federal Regulations.

C. *Changes in Planners' Titles and Method of Compensation*

In the early 1970s, the job title of the employees who performed the above-described work was vessel planner. The employees were paid by the hour and earned substantial overtime pay. In the mid-1970s, Respondent hired additional planners and changed the job titles. The new employees became junior planners and the incumbent planners became senior planners.

On January 31, 1992, Respondent changed the planners' job title again from senior planner to senior planning supervisor. Although Respondent changed the planners' mode of compensation from an hourly wage with substantial overtime compensation to a salary exempt from overtime compensation, the amount of money the planners received as a salary remained essentially the same as before.

The planners' supervisor, Ron Merical, explained Respondent's justification for the change in compensation. Merical testified that he had very little recollection of his discussion with planners Laura Pribanick and Don Burns. He did, however, testify that Matson wanted to bring Terminal Island to the standards of their other terminals:

> [T]hat the way we treated the planners in our other facilities were exempt. We wanted to bring them (Terminal Island planners) to the same status. We felt that the duties that they were performing certainly qualified for them to become exempt employees; that we had virtually eliminated the overtime, and in order to bring them exempt we felt, as a company, that we should raise their base salary to be more in line with the superintendent level position.

However, Merical also testified that the job duties of the planners did not change when their titles changed to senior planning supervisor. Although the job description for the title provides that the senior planning supervisor must be qualified to assume the role of a yard or vessel superintendent, Burns credibly testified that he was neither required to assume those roles, nor told of the requirement.

D. *Changes Occurring in Matson's Personnel Structure*

In the spring of 1994, Robert Eppley, manager of industrial relations for Respondent's Terminal Island facility, received a memorandum from Senior Vice President Gary North to Chief Executive Officer (CEO) C. Bradley Mulholland dated May 13, 1994, and titled ''Terminal Island Personnel Requirements.'' The memo provided for the hiring of additional vessel superintendents. However, it also provided directions regarding the reorganization of the vessel planning operation because of the impending commencement of Matson's new ''Pacific Coast Shuttle'' service. In the memo, North described the proposed restructuring at Terminal Island:

> Since Los Angeles will be the hub of the service, it is imperative that we structure our operations in a manner that maximizes asset utilization and enhances productivity. . . . Specifically, we need to change our philosophy as it relates to the various independent planning functions that take place at the terminal, i.e., vessel planning, yard planning, etc. To effectively use all our assets, we must integrate all planning processes from the gate to the vessel. A more globally centered approach to planning must be implemented with processes and systems that meet the needs and demands of the terminal and its customers.

Eppley testified that when he received the memo he was instructed by Respondent's personnel director, Marge Dineen, to hire college graduates[3] and to rotate them through all operations—yard, vessel, and planning. From June 1994–January 1995, 12 people were hired pursuant to Dineen's instructions.

In September 1994, Bal Dreyfus, Respondent's vice president and area manager for southern California, attended a management retreat where issues regarding Respondent's or-

[3] No college degree had previously been required of applicants.

ganizational structure were discussed. At that time, Dreyfus was in an executive development program and area manager for northern California. He transferred to his position in Los Angeles in mid-January 1995. Dreyfus testified that the retreat was essentially a brainstorming session where they discussed the integration of the vessel planner, vessel superintendent, and yard superintendent positions. However, no plans were made to implement any of the integration discussions.

In December 1994, Respondent created a team of employees, calling it the ''client team,'' to service ships not owned or operated by Respondent. All the employees on the team were responsible for all operations, and no specific individual had any specialized functions. Pribanick, senior supervisor, vessel planning, was the planner initially assigned to the client team. Yet, in early January, she was removed from the team because she was not a superintendent.

E. *Union's Attempt to Organize Vessel Planners*

In mid-November 1994, the Regional Director of the Board for Region 21 issued a decision in *Total Terminals, Inc*., 21–RC–19421. The director concluded that employees who perform vessel planning work are rank-and-file employees, and were not supervisors within the meaning of Section 2(11) of the Act.

Following the issuance of the *Total Terminals, Inc*. decision, ibid., Union Vice President James Spinosa began an organizing campaign at Respondent's facility in January. After obtaining signed authorization cards from a majority of Respondent's planners, the Union requested recognition from Respondent.

On February 6, Spinosa, along with Union President Zuliani and Union Secretary Nocetti, went to Respondent's facility to meet with Terminal Manager Kane. Spinosa informed Kane of the Union's receipt of signed authorization cards from a majority of the planners, and of the Union's intention to represent the planners. After a brief discussion, Kane told the union officials that he would respond to their request for recognition in a few days.

Soon after his meeting with the Union's officials, Kane informed Dreyfus of the Union's request for recognition. Thereafter, Dreyfus organized a series of meetings with Respondent's general counsel and several managers. At the meetings, Respondent's managers and attorney discussed implementation of the plan to combine the jobs of vessel superintendent, yard superintendent, and vessel planner. Eppley and Kane were directed to create a job description, the rotation schedule for the first rotations, and a plan to meet with all the affected individuals.

On February 12, the incumbent planners were informed of their advancement to the new position of ''Superintendent, Terminal Operations.'' Kane told the incumbents that the job of vessel planner had been combined with the jobs of yard and vessel superintendent to create the new position of ''Superintendent, Terminal Operations.''

On February 14, Spinosa sent Kane a letter protesting the change in the planners' jobs without first consulting the Union and complaining about Respondent's failure to respond to the Union's request for recognition. The next day the Union filed a petition on behalf of the planners. On February 17, Kane responded by refusing to recognize the Union on the ground that the planners were supervisors.

F. *Discussion and Conclusions*

The essential issue in this case is whether or not Respondent violated Section 8(a)(1) and (3) of the Act by combining the positions of yard superintendent, vessel superintendent, and vessel planner on February 11. Additionally, a question exists about whether before February 11 the vessel planners were employees under Section 2(3) of the Act, or were supervisors under Section 2(11) when Respondent instituted its plan.

Addressing the issue of what status the vessel planners held under the Act before February 11, Section 2(3) reads: ''The term 'employee' . . . shall not include any individual . . . employed as a supervisor.''

Section 2(11) defines a supervisor as

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Respondent conceded at trial that vessel planners could not hire, fire, transfer, suspend, lay off, recall, promote, reward, or discipline employees. Although Respondent argued that vessel planners assigned and directed work in a manner requiring use of independent judgment, I am not convinced that the vessel planners' duties regarding assignment and direction of others required the use of independent judgment.

In my opinion, the planners did exercise some judgment, as any nonsupervisory employee may do in the course of a regular business day. But the judgment they exercised was within set guidelines.

The vessel planners work was generated by, or perforce flowed from, information gathered by the booking department, or by the crane lineups, and/or by information concerning containers entered into the computers by others. When assigning containers to various locations on the ship, planners followed established standards and reference guides. Considering their training and experience, planners stowed containers based on their weight with the heaviest containers assigned locations at the bottom of the ship and the lightest containers on the top. Because only certain rows contain outlets for refrigerated containers, the planners placed them where the outlets were located. Many of the containers contained hazardous cargo that had to be segregated according to guidelines published by the Coast Guard in the Code of Federal Regulations.

In my opinion, the activities described above could hardly be defined as supervisory. In fact, the authority that the planners exercise clearly resembled authority of a merely routine nature. Unlike the planners, a supervisor's statutory authority must be exercised with independent judgment on behalf of management, and not in a routine manner. *Hydro Conduit Corp*., 254 NLRB 433, 437 (1981).

Furthermore, the January 31, 1992 job title change from senior planner to senior planning supervisor did not, in fact, change the planners' status under the Act. The status of supervisor under the Act is determined by an individual's duties, not by title or job classification. *John N. Hansen Co*.,

293 NLRB 63 (1989). Their titles may have changed, but their responsibilities ultimately remained the same as statutory employees. As Burns testified, he was neither required to assume supervisory roles, nor told of the requirement.

In construing the supervisory exemption, the Board has been cautioned not to interpret supervisory status too broadly because the inevitable consequence of such a construction is to remove the individual from the protections of the Act. *Westinghouse Electric Corp. v. NLRB*, 424 F.2d 1151, 1158 (7th Cir. 1970).

Accordingly, I find that the status of the vessel planners before February 11 was that of employees as defined by Section 2(3) of the Act, and not supervisors as defined by Section 2(11) of the Act.

Nevertheless, we must still turn to the principal issue of whether Respondent violated Section 8(a)(1) and (3) of the Act by combining the positions of yard superintendent, vessel superintendent, and vessel planner into the position of superintendent, terminal operations on February 11.

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board revealed the following causation test in all cases alleging violations of Section 8(a)(1) and (3) turning on employer motivation.

First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a ''motivating factor'' in the employer's decision. Upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The U. S. Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Corp.*, 462 U.S. 393, 399–403 (1983).

Applying *Wright Line* to the facts in this case, it is not difficult to conclude that the Union's request for recognition was the impetus for the final implementation of Respondent's plan on February 11.

When Respondent informed Burns and Pribanick, it claimed that no threats were made to them and that their job security was at no time threatened. Eppley testified that should either of them have expressed a desire not to be promoted, another position within the company would have been offered.

Although Respondent claims that neither Burns nor Pribanick expressed a desire not to be promoted, their testimony proved otherwise. Pribanick and Burns made it rather clear that they were not willing to supervise others. Where Respondent claims that Burns expressed ''some discomfort with supervising others,'' I found Burns and Pribanick's demeanor to be beyond mere discomfort with supervising others. Even though Eppley testified that another position within the company would have been offered, Eppley never informed Burns and Pribanick of this option. Basically, Burns and Pribanick were not aware that they had a choice. Their reasonable assumption was to take the promotion and not ask what would happen if they chose not to be promoted.

As the General Counsel contends, Respondent's actions did not merely reduce the size of a bargaining unit; Respondent eradicated the unit. Respondent's actions are analogous to those cases where wholesale promotion of bargaining unit employees to supervisory positions is part of a pervasive pattern to attempt to destroy a bargaining unit. *Bridgeport & Port Jefferson Steamboat Co.*, 313 NLRB 542, 546 (1993).

Where employees are promoted out of a bargaining unit immediately following the raising of a question concerning their representation rights the very timing is demonstrative of both illegal motivation and animus. *Regency Manor Nursing Home*, 275 NLRB 1261 (1985).

Accordingly, I find and conclude that counsel for the General Counsel's prima facie case has been adequately proven. As stated above, the result is that ''the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.''

Both in his opening remarks and during the taking of testimony Respondent's attorney admitted that the Union's request for recognition ''focused the company's attention'' regarding the overall plan to merge the three positions.

In attempting to meet its burden of showing that the same action would have taken place even in the absence of protected conduct, Respondent first admitted that the Union's recognition request was the ''motivating factor'' for its February 11 actions, and then proceeded to present very credible evidence that it was working toward implementation of its plan long before February 11. Basically, Respondent demonstrated that its plan would eventually have been carried out even in the absence of the Union's protected organizing activities.

The question remains, however, about its timing. For, the Charging Party cites a similar fact situation in *A.M.F.M. of Summers County*, 315 NLRB 727 (1994), where the Board adopted the findings of the administrative law judge:

> While it is true that Respondent had long been discussing the ''charge nurse as manager'' concept, and probably even intended to implement it somewhere down the line, when that might have occurred were it not for the union activity is a matter of pure speculation.

Thus, it is necessary to analyze the actions taken by Respondent in furtherance of its overall plan and decide whether implementation of the plan was ''a matter of pure speculation.''

In a memorandum dated May 13, 1994, Gary J. North advised CEO Mulholland:

> Specifically, we need to change our philosophy as it relates to the various independent planning functions that take place on the terminal, i.e., vessel planning, yard planning, etc. To effectively use all our assets, we must integrate all planning processes from the gate to the vessel.

Thereafter, Mulholland approved the directive, and Personnel Director Marge Dineen advised Eppley to hire four additional people. Eppley followed the directive and advised the new hires of the company's intention and expectation that the new hires would be rotated through all three functions of planning, yard, and vessel work.

However, none of the new hires were rotated into the different positions until after February 1995. Furthermore, evidence adduced at trial indicated that the incumbents, Burns and Pribanick, were not informed about Respondent's plans to integrate their positions until after February 11.

Turning to Respondent's next step in the implementation of its integration plan, Respondent organized a management retreat in September 1994. At the retreat, management had a ''brainstorming session'' where they discussed the integration of the vessel planner, vessel superintendent and the yard superintendent positions. Yet, no plans were made to implement any of the integration discussions. Five months later, the Union requested recognition by Respondent on February 6.

Very soon after the Union's request, Respondent took the most concrete actions to implement its plan. Dreyfus organized a series of meetings with Respondent's general counsel and several managers where they discussed implementation of the plan to combine the vessel planner duties. Eppley and Kane were directed to draft a job description, the rotation schedule for the first rotations, and a plan to meet with all of the affected individuals. It is not difficult to reason that the Union's request for recognition motivated Respondent to take action fully 5 months after the next previous action taken to implement Respondent's pending plan.

Summarizing Respondent's actions showing that it had a plan which predated the advent of the Union, we see (1) a memo in May, (2) followed by 8 months in which no incumbent was told of the impending changes, (3) a ''brainstorming'' meeting sometime in September, and, finally (4) 5 months later, shortly after the Union's advent, a rush to finish implementation of the plan.

These facts convince me that Respondent must be held to have failed in meeting its burden of proving that the changes would have occurred when and how they did, even in the absence of protected activities. Similar to the facts in *A.M.F.M. of Summers Co.*, supra, it is a matter of ''pure speculation'' as to how soon after the September 1994 management retreat Respondent would have actually implemented its plans in the absence of union activity. Where only 11 days after the Union's request for recognition, Kane responded by refusing to recognize the Union on the ground that the planners were supervisors, such speculation seems entirely unwarranted.

In view of the above, I find and conclude that counsel for the General Counsel and counsel for the Charging Party have proven that Respondent unlawfully created supervisory positions in direct response to the Union's request for recognition, and thus, in violation of Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The vessel planners' status before February 11 was that of employees as defined by Section 2(3) of the Act and not supervisors as defined by Section 2(11) of the Act.

4. Respondent violated Section 8(a)(1) and (3) of the Act by creating supervisory positions in direct response to the Union's request for recognition.

5. The above unfair labor practices have an effect on commerce as defined in the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Respondent is ordered to cease and desist from assigning supervisory duties to statutory employees to discourage them from supporting the Union or engaging in concerted activities. It is further ordered that Respondent cease and desist from restraining or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act. Respondent is also ordered to eliminate the position of superintendent, terminal operations and restore the positions of senior supervisor, vessel planning; yard superintendent; and vessel superintendent as they existed prior to February 11, 1995. Respondent must offer immediate and full reinstatement to said positions without prejudice to the employees' seniority or any other rights or privileges previously enjoyed and make employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. Backpay, if applicable, shall be computed in the manner prescribed by *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977). Interest on any such backpay shall be computed as in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]